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IN THE

Supreme Court of the United States

October Term, 1969
No. 1535

RICHARD W. ERICKSON, *et al.*,

Petitioners,

vs.

CAPITOL RECORDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District.

RESPONDENT'S BRIEF IN OPPOSITION.

Proceedings Below.

The opinion of the California Court of Appeal is reported at 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969). Hearing in the Supreme Court of the State of California was denied on February 5, 1970, see 82 Cal. Rptr. at 798.

Jurisdiction.

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2); since the validity of a state statute is not in issue, we assume that petitioners intended to rely, instead, upon 28 U.S.C. §1257 (3).

Question Presented.

Respondent contends that the decision below is not final and that there are adequate state grounds on which it was based. Only if petitioners can overcome these infirmities in their Petition is the following federal question presented:

May a state, despite *Sears*[1] and *Compco*,[2] prohibit the unauthorized appropriation and duplication in commercial quantities of performances embodied on a phonograph record, whether under unfair competition, common-law copyright or other applicable state law?

Statement.

Petitioners are admittedly engaged in conduct commonly called "record piracy." They obtain a "hit" record and by simple electronic means transfer and duplicate, without authority or payment, the performances embodied therein onto tapes which are then sold commercially. [See Clerk's Transcript, hereinafter "C.T." 12-13; see also 2 Cal. App. 3d at 528, 82 Cal. Rptr. at 799].

Respondent Capitol Records, Inc. ("Capitol") is a leading manufacturer of phonograph records of both disc and tape varieties. [C.T. 8-9.] Capitol enters into contracts with performing artists in which Capitol is granted the exclusive right to manufacture and sell records embodying the artists' performances, the complete ownership of these performances, and the exclusive right to use the artists' names in connection with the sale of such records. [C.T. 2.] Capitol's agreement

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[1]Sears, Roebuck & Company v. Stiffel Co., 376 U.S. 225 (1964).

[2]Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

with "The Lettermen," a prominent recording group whose records are in great demand, is one such agreement.

The production of master recordings used in record manufacture is costly, and Capitol expends large sums in this phase of its business, which includes maintenance of recording studios and utilization of the services of highly-skilled personnel. Capitol prepares and packages record albums containing a number of recorded performances, and selects a title for marketing these albums. In this fashion, a number of performances by The Lettermen were incorporated into an album ("Lettermen album") to which Capitol assigned the title "Goin' Out Of My Head." The Lettermen album was successful; prior to issuance of the preliminary injunction, over 200,000 copies had been distributed, and Capitol's gross receipts from this album were in excess of $500,000. [C.T. 8-15.]

Upon selling its records, Capitol incurs substantial additional liabilities. Based upon its sales, it pays royalties to the performing artists, fees to trust and pension and welfare funds maintained by the performers' unions and guilds, and copyright royalties to the copyright proprietors of the musical compositions which are embodied on the album.[3] [C.T. 3.]

Capitol also has spent millions to advertise and promote its artists and records, including The Lettermen

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[3]Despite petitioners' pious claim that they are prepared to pay the compulsory royalty to the copyright proprietors of the compositions embodied on their pirated tapes, as required by 17 U.S.C. §1(e), a search of the records of the Copyright Office discloses that petitioners have not as yet even taken the preliminary step of filing a Notice of Intention to Use the copyrighted compositions embodied in the Lettermen album, as required by 17 U.S.C. §101(e). Petitioners do not even claim to pay artists' royalties and union fees.

album. This advertising and exploitation associates the names of Capitol's artists with the titles of Capitol's albums and with Capitol and its trademark or "label." As a result, the public associates the album titles designated by Capitol with the featured artists, and the titles and artists with Capitol. In the marketplace, records are customarily requested and ordered by reference to the artists' names and the album title. [C.T. 10.]

In their "business" of record piracy, petitioners have admittedly duplicated, among others, the actual performances embodied on The Lettermen album, by transferring them electronically from a Capitol record which they acquired to tape cartridges which they then marketed in quantity under the original artist designation and album title used by Capitol, all without license or authority. [C.T. 11-13.]

This action was commenced to prevent petitioners from deliberately duplicating Capitol's recordings in commercial quantities and for commercial purposes. Rights to record a particular musical composition and to broadcast (or "play") recordings are not involved. Neither is petitioners' right to produce recordings utilizing their own artists, musicians and technicians; they may use the same compositions recorded by Capitol (or anyone else), but the compulsory license provisions of the Copyright Act (17 U.S.C. §1(e)) which give petitioners the right to make their own recordings do not countenance the unlicensed transfer of recorded performances from phonograph records produced by Capitol to those offered for sale by petitioners.

Respondent Capitol sought a temporary restraining order upon filing this action and thereafter a preliminary injunction. Both were granted. [C.T. 83, 93, 95-

97.] Petitioners appealed from the order granting the preliminary injunction *pendente lite* [C.T. 100], which was affirmed by the California Court of Appeal on principles of California law; the California Supreme Court declined to review the case, so that the Petition seeks review of the decision of California's intermediate appellate court.

In the Petition for Writ of Certiorari, and particularly in their statement of the Case [Pet. 5-8] and Appendix C, petitioners set forth as though uncontroverted fact numerous assertions supported only by documents which are merely self-serving (but never conceded) declarations in the Clerk's Transcript of petitioners, their attorneys or witnesses, and numerous other assertions which have no support whatever in the record before this Court.

ARGUMENT.

1. Petitioners Seek Review of an Interlocutory Order and Not of a Final Judgment.

The decision of the California Court of Appeal below affirmed the trial court's granting of a prelimary injunction, *pendente lite*. [C.T. 95-97.] In affirming, the appellate court expressly noted the necessity for further trial proceedings on the important related issues of "palming off" and confusion as to source. 2 Cal. App. 3d at 537, 82 Cal. Rptr. at 806. These further proceedings have not taken place, and the decision below is thus not a reviewable final judgment within the meaning of 28 U.S.C. §1257.

Petitioners argue that respondent somehow has the power to prevent the final determination of the case on the merits and to keep them, by means of one or a series of preliminary injunctions, from ever obtaining a final judgment which would be reviewable.

Sheer nonsense. A defendant, as well as a plaintiff, in California can have a case set for trial (see California Rules of Court 206, 207 and 220, quoted in Appendix 1 hereto), and this case is even entitled to a priority in setting, see California Code of Civil Procedure, §527.

The rule governing finality of judgments applicable to this case is stated in *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., Inc.*, 344 U.S. 178, 181 (1952):[4]

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[4]Although the doctrine of the Ledbetter case has been limited in circumstances involving the exclusive power of the NLRB, the basic rule regarding the finality of reviewable judgments as enunciated in Ledbetter has remained unaffected.

> "It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case."

Petitioners seek to excuse this prematurity in their seeking certiorari by arguing, in Appendix C to their Petition, that the preliminary injunction is virtually a determination on the merits since a trial would be a mere formality. The authorities cited by petitioners in support of this contention are inapplicable to this case. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), involved review of an injunction issued after a trial on the merits and which was to remain in effect permanently unless modified; here only a temporary injunction *pendente lite* is before the Court.

In *Mercantile National Bank at Dallas v. Langdeau, Receiver*, 371 U.S. 555 (1963), the Court accepted an important question of venue, a procedural issue, for determination "anterior to the merits." 371 U.S. at 558. Similarly, in *Local No. 438 Construction & General Laborers' Union AFL-CIO v. Curry*, 371 U.S. 542, 549 (1963), the first ground of decision was that the issue before the court was " 'separable from and collateral to rights asserted in the action . . .' " Nothing

similar is involved here, and all unresolved issues of fact and law are closely interwoven.

Further, *Curry* and *Mills v. Alabama*, 384 U.S. 214 (1966), each involved a concession by the petitioner of all the operative facts on which the case would turn. Petitioners apparently seek to avail themselves of this procedure by now admitting that they have "been engaged in the proscribed conduct." Pet. Appendix C 9-10. However, despite petitioners' purported "concession" as to the fact of their engaging in record piracy, there still remain both factual and legal issues which arise from the use by petitioners of the names of Capitol's recording artists and the titles of Capitol's phonograph record albums to identify petitioners' pirated tapes, and from the effect, if any, of the so-called "disclaimer" quoted at C.T. 88. As stated in the opinion of the court below, 2 Cal. App. 3d at 537, 82 Cal. Rptr. at 806, petitioners' conduct raises a "question of fact for the court at the trial regarding a permanent injunction as to whether [petitioners'] conduct constituted 'palming off" or confusion of the public as to the source of the recorded performances."

Even the Declaration of Richard W. Erickson quoted by petitioners in Appendix C-1 to the Petition (which declaration is not even in the record before this Court), indicates the still unresolved issue of the comparative quality of petitioners' and Capitol's tapes, raised by respondent at the initial stages of this case to indicate the importance of protecting the consuming public from petitioners' deceptive trade practices and inferior products.

Petitioners are therefore inexorably placed on the horns of a dilemma. Either their concession as to their

conduct still leaves unresolved material issues of fact and law, in which event their Petition is premature as not seeking review of a final judgment; or, if their concession is final, dispositive and covers all material issues, then the questions of "palming off" and confusion as to source must be considered as having been decided in favor of Capitol and there are then adequate state grounds for the decision below. This Court, in *Sears,* expressly stated that "a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source . . ." 376 U.S. at 232. See also the similar expression in *Compco,* 376 U.S. at 238.

Since petitioners raise questions in their Petition (pp. 40-47) as to the sufficiency of the evidence of confusion or "palming off" (indeed respondent, plaintiff below, has not yet had an opportunity to present its evidence on these questions), it is apparent that they did not intend their "concession" to encompass all material issues. Petitioners' major argument against prematurity must accordingly fail.

2. Recorded Performances Are Now and Always Have Been Protectible Under State Law.

Petitioners' case is founded on the premise that the California Court of Appeal erred because (a) Capitol's records are not copyrighted under federal law and have been sold by Capitol on the open market, and (b) federal law, since the decisions in *Sears* and *Compco,* abrogates a state's power to do anything about record piracy in which petitioners admittedly engage. As

shown below, neither of these arguments can be sustained.

a. Petitioners Derive No Right to Appropriate Capitol's Recorded Performances Merely Because Capitol's Records Are Sold Publicly and Are Not Subject to Federal Copyright.

All parties agree that recorded performances are not presently covered by federal copyright protection. From this, petitioners attempt to make a derivative point that therefore recorded performances are not protected at all and are in the public domain. The law is to the contrary.

Federal copyright law expressly reserves to the states the protection of what is referred to as "common law copyright."

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work . . ." 17 U.S.C. §2.

The sale of phonograph records embodying a recorded performance does not constitute a divesting, or "general," publication of such recorded performance. *Capitol Records, Inc. v. Mercury Records Corp.*, 109 F. Supp. 330 (S.D.N.Y. 1952), *aff'd* 221 F. 2d 657 (2d Cir. 1955),[5] *Capitol Records, Inc. v. Greatest Records, Inc.*,

[5]Cited hereafter simply as the "Capitol-Mercury" case. In this case, two reputable record companies purported to acquire from two different grantors the rights to manufacture the same record. However, while Capitol's grantor had the rights it granted to Capitol, Mercury's grantor did not, although Mercury's good faith was not in issue. Notwithstanding the fact that Capitol manufactured and sold copies of the record, Mercury was enjoined from manufacturing the same record, even from its own purchased "master." *A fortiori*, the case squarely prevents petitioners from pirating Capitol's records without any color of right.

43 Misc. 2d 878, 252 N.Y.S. 2d 553 (Sup. Ct. 1964); *Waring v. WDAS Broadcasting Station,* 327 Pa. 433, 194 Atl. 631 (1937); see *Ferris v. Frohman,* 223 U.S. 424 (1912) (public performances of play not general publication); and see *King v. Mister Maestro, Inc.,* 224 F. Supp. 101 (S.D.N.Y. 1963) (delivery of Rev. King's "I Had A Dream" speech over nationwide radio and television and in newsreels not a general publication).

Petitioners' authorities do not support their contention otherwise. *RCA Mfg. Co. v. Whiteman,* 114 F. 2d 86 (2d Cir. 1940) was overruled by the Second Circuit in the *Capitol-Mercury* case (221 F. 2d at 663) and is inapplicable in any event. The case did not concern any asserted right to transfer performances embodied on records; it involved merely the right to broadcast such recorded performances by radio. Thus the records were only "played." As the Second Circuit stated, they were in fact "intended for that purpose and for that alone." 114 F. 2d at 88. *Shapiro, Bernstein & Co. v. Miracle Record Co.,* 91 F. Supp. 473 (N.D. Ill. 1950) and *Mills Music v. Cromwell Music, Inc.,* 126 F. Supp. 54 (S.D.N.Y. 1954) involved only the musical material as distinguished from the particular recorded performance.[6]

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[6]Petitioners also cite to the Second Circuit's decision in Fashion Originators Guild v. Federal Trade Com'n (114 F.2d 80 (1940)) as authority for their argument that sale of phonograph records constitutes a divesting publication. This Court (312 U.S. 457 (1941)) apparently found so much of Judge Hand's discussion as dealt with publication to be unnecessary to the decision and treated it as a state, not federal, question. Moreover, the case dealt with design elements which were copied, not performances which were appropriated. If the instant matter dealt with the design rather than the embodied performances of phonograph records, the dicta might be relevant.

Thus, petitioners' assertion that the recorded performances are in the public domain is erroneous and the *Sears* case in footnote 7 (376 U.S. at 231) notes the reservation to the states of the rights being asserted by Capitol herein.

Petitioners attempt to construct a major constitutional issue by baldly claiming that public sale of phonograph records constitutes a divesting publication of the recorded performance so that 17 U.S.C. §2 is inapplicable. However, since this claim has been rejected by an unbroken line of holdings to the contrary, there is no such issue. Similarly, petitioners' purported "policy" arguments based upon federal copyright law, ignore the significance of the reservation of rights to the states under 17 U.S.C. §2 and the policy considerations implicit therein. Thus the statutory scheme itself accommodates the states' interests and activity in the field of copyright. No wonder that, as petitioners complain, the court below did not feel compelled to discuss issues of federal constitutionality and policy; state law being applicable, such issues had no bearing on its decision.

b. The Sears and Compco Decisions Do Not Apply and in Any Event Do Not Sanction Record Piracy.

It is thus clear that state law is applicable and that Congress itself has reserved to the states the protection of recorded performances. See *Fashion Originator's Guild v. Federal Trade Com'n,* 312 U.S. 457, 468 (1941) (copying of dress designs). Accordingly, *Sears* and *Compco* do not reach this case. The decisions are in accord, including *RCA Mfg. Co. v. Whiteman, supra,* relied on by petitioners and the

Capitol-Mercury case, both of which specifically held state law applicable to the protection of performances embodied on phonograph records.

In any event, *Sears* and *Compco* are factually distinguishable in that they hold only that where property is not protected by a patent, anyone may imitate or simulate the product. The defendants in *Sears* and *Compco* merely examined plaintiffs' products and then, using their own labor, capital and skill, manufactured their own distinct product as an imitation of plaintiffs' product. *But the very thing itself was not appropriated.*

The product of Capitol which has been taken—not merely copied—by petitioners is the thing of value itself—the exact combination of sounds embodied on Capitol's phonograph record.

Indeed, the language of the *Sears-Compco* court stresses the distinction. There is constant reference to copying the design of plaintiff's lighting fixtures. See, *e.g.* 376 U.S. at 230, 231.

Sears and *Compco* could be analogous if petitioners had imitated Capitol's recordings. That is, had petitioners listened to a Capitol album and then hired and paid performers, musicians, arrangers, engineers and technicians, paid for recording studio facilities and manufactured their own distinct product which strove to sound like Capitol's records, *Sears* and *Compco* might obtain.

But that is not this case. Petitioners have not merely imitated Capitol's product, as Sears, Roebuck did the Stiffel pole lamp. They have chosen to duplicate in large quantities from Capitol's recordings the

very performance which is Capitol's product, utilizing as well, and inevitably trading upon, Capitol's titles and artists.

While there is no post-*Sears-Compco* appellate decision involving records other than this case, *Sears* and *Compco,* and their progeny, have not rendered record piracy legitimate. In analogous circumstances, a federal district court has also rejected the argument advanced by petitioners based on those cases. *Grove Press, Inc. v. Collectors Publication, Inc.,* 264 F. Supp. 603 (C.D. Cal. 1967) (photocopying and reproduction of plaintiff's uncopyrighted book), which held:

> "Unfair appropriation of the property of a competitor is unfair competition and redressable in a situation of this kind despite the holding in Sears, Roebuck & Co. v. Stiffel, supra, and Compco Corp. v. Day-Brite Lighting, Inc., supra. Greater Recording Co. v. Stambler, [citation]; Flamingo Telefilm Sales, Inc. v. United Artists Corp., [citation]; cf. Cable Vision, Inc. v. KUTV, Inc., [citation].
>
> "Defendants' first edition is more than mere copying of plaintiff's work, the Grove edition. In view of Plaintiff's expenditure of substantial sums in setting type and engraving plates, it would constitute unfair competition for Defendants to appropriate the value and benefit of such expenditure to themselves by photographing and reproducing Plaintiff's book through the offset-lithography process, thereby cutting their own costs and obtaining an unfair competitive advantage. See International *News Service v. Associated Press,* [citation]." (*id.* at 606-07).

See also *Pottstown Daily News Pub. Co. v. Pottstown Broadcasting Co.*, 247 F. Supp. 578 (E.D. Pa. 1965), and *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 252 N.Y.S. 2d 553 (1964).

In support of their *Sears-Compco* contention, petitioners cite and principally rely upon five cases, none of which is in point.

i. *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914, 2d Cir. (1952). First, this case was decided by the Second Circuit prior to that court's decision in *Capitol-Mercury* (discussed in note 5, above), which enjoined even good faith record duplication. The case was expressly decided upon the basis that the federal statutory copyright in the work had expired. Had there been no copyright, as in the case of a recorded performance, the court itself noted it would have had to refer to state law and might have reached a contrary conclusion.

ii. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), *cert. den.* 379 U.S. 989 (1965) relates to so-called community antenna television ("CATV"), and held that CATV was not engaged in unfair competition, relying upon *Sears* and *Compco*.

The case is hardly authority for the proposition that petitioners may, with judicial blessing, engage in record piracy. Duplication was not involved in *Cable Vision*, and the distinction between CATV and record piracy is the difference between extending the reach of a television broadcast and physically duplicating a phonograph record. Both the Ninth Circuit in *Cable Vision* and this Court in the *Fortnightly* case[7] made

[7]Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) which held, under the circumstances, that CATV

(This footnote is continued on the next page)

abundantly clear that the defendants in those cases were engaged not in any kind of physical duplication, but only in putting up a larger antenna and running a longer cable to the television set. Notably, the Court of Appeals in *Cable Vision* cited, with apparent approval, *Flamingo Telefilm Sales Co., Inc. v. United Artists Corp.*,[8] where the court, in enjoining one who had physically incorporated a portion of the plaintiff's motion picture into a television program, stated:

> "Whether this cause be denominated as sounding in 'unfair competition' or 'intentional interference with economic or contractual relations,' this court cannot, in view of the background of jurisprudence and decisional law in this area, hold that these recent decisions [*Sears* and *Compco*] which involved distinguishable factual situations, wiped clean the slate of precedent and empowered the unauthorized appropriation of artistic performances to the profit of others." 141 U.S.P.Q. at 462.

iii. *Angell Elevator Lock Company v. Manning*, 348 Mass. 623, 205 N.E. 2d 245 (1965). This case involves copying of the details of form and appearance of another's product, and not its appropriation. As in *Sears* and *Compco*, the defendant merely set out to manufacture its own product designed to look and operate like the plaintiff's product. But at least defendant, having studied plaintiff's product, manufactured its own,

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was not a copyright infringer. Notably, just a few weeks before, the Court had held CATV subject to FCC regulation in United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

[8]141 U.S.P.Q. 461 (Sup. Ct. N.Y. 1964). After the Ninth Circuit's decision in Cable Vision, the Flamingo Telefilm case was reversed on procedural grounds. 22 App. Div. 2d 778, 254 N.Y.S. 2d 36 (1964).

and Massachusetts law historically has permitted wide latitude in industrial copying. 348 Mass. at 626, 205 N.E. 2d at 248. The court indicated that equitable relief would be available if "more than mere copying of 'details of form and appearance'" were present. *Ibid.*

iv. *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F. 2d 315 (1st Cir.), *cert. den.* 389 U.S. 1007 (1967), which involved the claim that the "Palladin" character in the CBS television series "Have Gun, Will Travel" was copied from a character which plaintiff DeCosta created and portrayed "live." Apart from any *Sears-Compco* application, relief was denied on purely state grounds, and further if the character were sufficiently delineated to have merited protection, it had been printed on uncopyrighted cards that had been generally published.

v. *Smith v. Chanel, Inc.*, 402 F. 2d 562 (9th Cir. 1968). This case concerned an issue of comparative advertising, plaintiff having conceded that defendants had "the right to copy, if they can" the plaintiff's formula for perfume. 402 F. 2d at 563. Product imitation, not appropriation, was involved. We, too, have repeatedly noted that petitioners herein might well have the right to record themselves the same compositions in the same style as does Capitol, but not to electronically transfer the performances embodied in Capitol's records.

None of the cases relied on by petitioners involves such flagrant commercial immorality as is present here. Petitioners are engaged in parasitic conduct of a nature made possible only by the electronic techniques of our times which permit unlimited duplication of recorded performances derived from the purchase of a single record. As the court below admonished, permitting such

conduct would discourage invention and free competition. This conclusion is consistent with the policies enunciated by this Court and there is no reason to disturb the result.

Conclusion.

There is no constitutional question involved in this case, and no so-called "federal policy" considerations. The decision of the court below may be sustained upon independent and adequate state grounds. And, in any event, no final judgment reviewable by this Court has as yet been rendered. The petition for *certiorari* should be denied.

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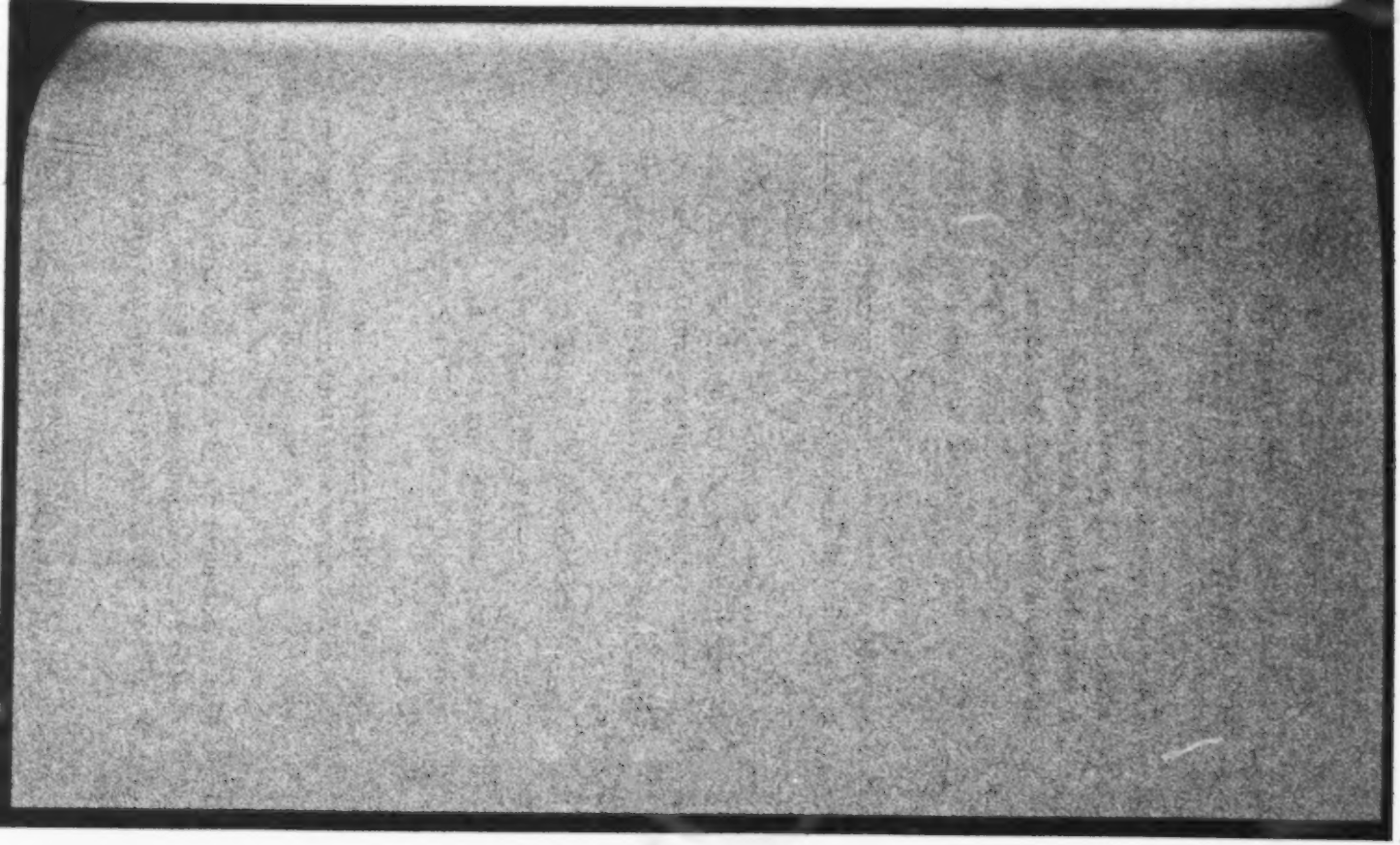

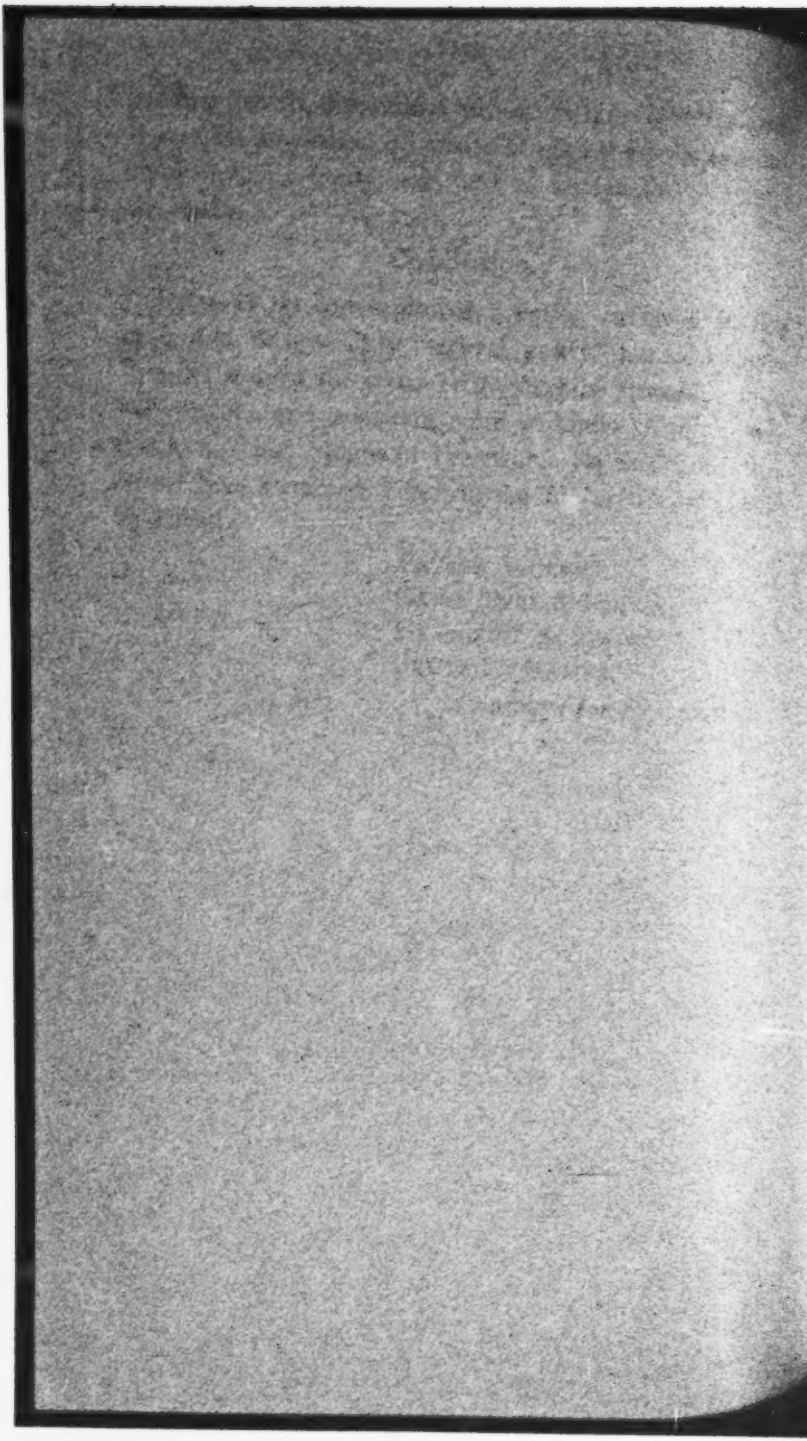

APPENDIX 1.

RULE 206. *MEMORANDUM THAT CIVIL CASE IS AT ISSUE.*

(a) No civil case shall be placed on the civil active list or be set for a pretrial conference, for a trial setting conference or for trial until it is at issue and unless a party thereto has served and filed therein an at-issue memorandum, stating:

(1) The title and number of the case;

(2) The nature of the case;

(3) That all essential parties have been served with process or appeared therein and that the case is at issue as to all such parties;

(4) Whether the case is entitled to legal preference and, if so, the citation of the section number of the code or statute granting such preference;

(5) Whether or not a pretrial conference is requested;

(6) Whether or not a jury trial is demanded;

(7) The time estimated for the trial;

(8) The name, addresses and telephone numbers of the attorneys for the parties or of parties appearing in person.

(b) Any party not in agreement with the information or estimates given in an at-issue memorandum shall within ten days after the service thereof serve and file a memorandum on his behalf.

(c) If a pretrial conference is not requested, it may thereafter be requested by either party and such request shall be granted unless to do so will in the opinion of

the court unreasonably interfere with bringing the case to trial or will otherwise result in unfair advantage to any party.

RULE 207. *CIVIL ACTIVE LIST*

(a) [Preparation] At least once in each calendar month, on a day to be designated by the presiding judge or the judges, the clerk shall prepare a list of all civil cases at issue but not yet set for trial wherein an at-issue memorandum has theretofore been filed. Such list shall be known as the civil active list and shall be available for public examination.

(b) [Contents] The cases enumerated on the civil active list shall be designated by their number and by the surname of the first-named party on each side and shall be arranged in order in which the at-issue memoranda were filed.

RULE 220. *SETTING FOR TRIAL WITHOUT PRETRIAL CONFERENCE IN COURTS HAVING MORE THAN TEN JUDGES*

(a) At least once a month in courts having more than ten judges, from the cases on the civil active list in which no pretrial conference is required, other than short causes set under Rule 207.1, times and places shall be assigned for a trial setting conference during such period as will permit their being set for trial not later than 12 weeks after the conference. This setting for a trial setting conference shall: (i) be by or under the supervision of the presiding judge; (ii) be in the sequence as nearly as possible in which the cases appear on the civil active list; (iii) give priority to those cases entitled thereto under the law; and (iv) insofar as feasible assign the same date for trial setting conferences

to those cases in which the same attorney appears. The presiding judge shall provide for a trial setting conference calendar. Motions to continue any such conference shall be made to the trial setting conference judge or, if not available before the presiding judge; and motions to advance, reset, or specially set for trial setting conference shall be made in like manner as such motions are made in respect to the trial of a case.

(b) The clerk shall give not less than 60 days' notice by mail of the time and place of the trial setting conference in each case to all parties appearing therein unless the parties agree to a shorter time or the court orders the time shortened for good cause shown upon noticed motion, and no further notice thereof need be given by any party to the case.